2003

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25 T. Jefferson L. Rev. 367-388 (2003)

March 2010

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ARE FOREIGN NATIONALS ENTITLED TO THE SAME CONSTITUTIONAL RIGHTS AS CITIZENS?

David Cole*

In the wake of the terrorist attacks of September 11, 2001, the federal government has targeted foreign nationals for its most invasive security measures. Foreign nationals alone are subject to trial by military tribunal if accused of terrorist crimes. Thousands of foreign nationals have been detained under terrorist-related initiatives, most conducted under the rubric of the immigration law. Foreign nationals have been subjected to selective interrogation, registration, detention, and deportation on the basis of their national identity. Foreign nationals were the targets of the most extreme provisions in the USA PATRIOT Act, enacted six weeks after September 11, 2001. In short, in striking the balance between liberty and security, we have adopted the easy choice of sacrificing the liberties of a vulnerable minority — foreign nationals, and especially Arab and Muslim foreign nationals — for the purported security of the majority.[1]

One of the most common responses to this criticism is to assert that foreign nationals do not deserve the same rights as American citizens, and that therefore treating them differently is legitimate as a constitutional and normative matter. That response strikes a chord with the widely shared assumption that citizenship makes a difference, and that the difference warrants the distinct treatment that foreign nationals receive. Thus, when President Bush issued the military order authorizing military tribunals, Vice President Cheney defended its limitation to foreign nationals in the following terms:

> [S]omebody who comes into the United States of America illegally, who conducts a terrorist operation killing thousands of innocent Americans — men, women, and children — is not a lawful combatant . . . . They don't deserve the same guaran-

* Professor, Georgetown University Law Center. This article is adapted from a chapter in DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM 1-82 (2003).

1. I set out this critique in detail in David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953 (2002), and in DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM (2003).

> tees and safeguards that would be used for an American citizen going through the normal judicial process.[2]

The view that foreign nationals do not deserve the same constitutional protections as U.S. citizens was given some support in April 2003 when a divided Supreme Court in *Demore v. Kim*[3] upheld a 1996 statute imposing mandatory detention on foreign nationals charged with being deportable for having committed certain crimes. The statute at issue mandated detention pending the adjudication of the deportation hearing even where, as in Kim's case, the government agreed that detention was not necessary, because the individual posed neither a flight risk nor a danger and could be released on bond. For the first time ever outside the war setting, the Court in *Kim* upheld categorical preventive detention without any individualized assessment of the need for detention. And the majority did so by expressly invoking a double standard, claiming that in regulating immigration, "Congress regularly makes rules that would be unacceptable if applied to citizens."[4] Yet fifty years earlier, the Court had stated that the Due Process Clause does not "acknowledge[ ] any distinction between citizens and resident aliens."[5]

Are foreign nationals entitled only to reduced rights and freedoms? The difficulty of the question is reflected in the deeply ambivalent approach of the Supreme Court, an ambivalence matched only by the alternately xenophobic and xenophilic attitude of the American public toward immigrants. On the one hand, the Court has insisted for more than a century that foreign nationals living among us are "persons" within the meaning of the Constitution, and are protected by those rights that the Constitution does not expressly reserve to citizens. Because the Constitution expressly limits to citizens only the rights to vote and to run for federal elective office, equality between non-nationals and citizens would appear to be the constitutional rule.

On the other hand, the Court has permitted foreign nationals to be excluded and expelled because of their race.[6] It has

2. Elisabeth Bumiller & Steven Lee Myers, *Senior Administration Officials Defend Military Tribunals for Terrorist Suspects*, N.Y. TIMES, Nov. 15, 2001, at B6.

3. Demore v. Kim, 538 U.S. 510 (2003).

4. *Id.* (quoting Mathews v. Diaz, 426 U.S. 67, 80 (1976)).

5. Kwong Hai Chew v. Colding, 344 U.S. 590, 598 n.5 (1953).

6. The Japanese Immigrant Case (Yamataya v. Fisher), 189 U.S. 86 (1903); The Chinese Exclusion Case (Chae Chan Ping v. United States), 130 U.S. 581 (1889).

allowed them to be deported for political associations that were entirely lawful at the time they were engaged in.[7] It has upheld laws barring foreign nationals from owning land, even where the laws were a transparent cover for anti-Japanese racism.[8] It has permitted the indefinite detention of "arriving aliens" stopped at the border on the basis of secret evidence that they could not confront.[9] And it has allowed states to bar otherwise qualified foreign nationals from employment as public school teachers and police officers, based solely on their status as foreigners.[10]

Given this record, it is not surprising that many members of the general public presume that noncitizens do not deserve the same rights as citizens.[11] But the presumption is wrong in many more respects than it is right. While some distinctions between foreign nationals and citizens are normatively justified and consistent with constitutional and international law, most are not. The significance of the citizen/noncitizen distinction is more often presumed than carefully examined. Upon examination, there is far less to the distinction than commonly thought. In particular, foreign nationals are generally entitled to the equal protection of the laws, to political freedoms of speech and association, and to due process requirements of fair procedure where their lives, liberty, or property are at stake.

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7. Galvan v. Press, 347 U.S. 522 (1954).

8. Porterfield v. Webb, 263 U.S. 225 (1923) (upholding Washington's alien land law); Terrace v. Thompson, 263 U.S. 197 (1923) (upholding California's alien land law). In 1948, the Court invalidated California's law as applied to a U.S. citizen child of a Japanese national. Oyama v. California, 332 U.S. 633 (1948). And in *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948), the Court invalidated a California law barring issuance of commercial fishing licenses to Japanese resident aliens, but expressly distinguished the alien land laws. *Takahashi*, 334 U.S. at 422. Thus, "the U.S. Supreme Court technically never found the [alien land] laws unconstitutional." Brant T. Lee, *A Racial Trust: The Japanese YWCA and the Alien Land Law*, 7 ASIAN PAC. AM. L.J. 1, 28 (2001).

9. Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953).

10. Foley v. Connelie, 435 U.S. 291 (1978) (permitting states to require citizenship in hiring state troopers); Ambach v. Norwick, 441 U.S. 68 (1979) (permitting states to require citizenship in hiring public school teachers); Cabell v. Chavez-Salido, 454 U.S. 432 (1982) (permitting states to require citizenship in hiring of deputy probation officers).

11. A November 2001 poll conducted by National Public Radio, Harvard University's John F. Kennedy School of Government, and the Kaiser Family Foundation found that 56 percent of those surveyed said that noncitizens visiting or living legally in the United States should have different rights than U.S. citizens. The question specifically excepted the right to vote or hold public office. Deborah L. Acomb, *Poll Track for December 15, 2001*, NAT'L J., Dec. 15, 2001.

I. ALIENS, CITIZENS, AND CONSTITUTIONAL RIGHTS

The Constitution does distinguish in some respects between the rights of citizens and noncitizens: the right not to be discriminatorily denied the vote and the right to run for federal elective office are expressly restricted to citizens.[12] All other rights, however, are written without such a limitation. The Fifth and Fourteenth Amendment due process and equal protection guarantees extend to all "persons." The rights attaching to criminal trials, including the right to a public trial, a trial by jury, the assistance of a lawyer, and the right to confront adverse witnesses, all apply to "the accused." And both the First Amendment's protections of political and religious freedoms and the Fourth Amendment's protection of privacy and liberty apply to "the people."

The fact that the Framers chose to limit to citizens only the rights to vote and to run for federal office is one indication that they did not intend other constitutional rights to be so limited. Accordingly, the Supreme Court has squarely stated that neither the First Amendment nor the Fifth Amendment "acknowledges any distinction between citizens and resident aliens."[13] For more than a century, the Court has recognized that the Equal Protection Clause is "universal in [its] application, to all persons within the territorial jurisdiction, without regard to differences of . . . nationality."[14] The Court has repeatedly stated that "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."[15] When noncitizens, no matter what their status, are tried for crimes, they are entitled to all of the

12. U.S. CONST. art. I, §§ 2, 3; U.S. CONST. art. II, § 1; U.S. CONST. amend. 15. The Constitution's limitation to citizens of the right against discriminatory denial of the vote does not mean that noncitizens cannot vote. If a state or locality chooses to enfranchise its noncitizen residents, it may do so. Indeed, until the early twentieth century, noncitizens routinely enjoyed the right to vote as a matter of state and local law. By contrast, the Constitution expressly restricts to citizens the right to hold federal elective office.

13. *Chew*, *supra* note 5, at 596 n.5 (1953) (construing immigration regulation permitting exclusion of aliens based on secret evidence not to apply to a returning permanent resident alien because of the substantial constitutional concerns that such an application would present).

14. Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

15. Zadvydas v. Davis, 533 U.S. 678, 693 (2001); *see also Mathews*, 426 U.S. at 77 (holding that due process applies to all aliens in the United States, even those whose presence is "unlawful, involuntary, or transitory").

rights that attach to the criminal process, without any distinction based on their nationality.[16]

There are strong normative reasons for the uniform extension of these fundamental rights. As James Madison himself argued, those subject to the obligations of our legal system ought to be entitled to its protections:

> [I]t does not follow, because aliens are not parties to the Constitution, as citizens are parties to it, that whilst they actually conform to it, they have no right to its protection. Aliens are not more parties to the laws, than they are parties to the Constitution; yet it will not be disputed, that as they owe, on one hand, a temporary obedience, they are entitled, in return, to their protection and advantage.[17]

While Madison's view was not without its critics, his view prevailed in the long run.[18] On this view, the Constitution pre-

16. Almeida-Sanchez v. United States, 413 U.S. 266 (1973). *See also* Bridges v. Wixon, 326 U.S. 135, 161 (1945) (Murphy. J., concurring) (arguing that noncitizens are protected by the First, Fifth, and Fourteenth Amendments); Wong Wing v. United States, 163 U.S. 228 (1896) (holding that noncitizens charged with crimes are protected by the Fifth, Sixth, and Fourteenth Amendments); Fong Yue Ting v. United States, 149 U.S. 698, 724 (1893) (observing that foreign nationals are entitled to all "the safeguards of the Constitution, and to the protection of the laws, in regard to their rights of person and of property, and to their civil and criminal responsibility"); Nishimura Ekiu v. United States, 142 U.S. 651, 660 (1892) (noting that foreign nationals incarcerated here have a constitutional right to invoke habeas corpus). Chief Justice Rehnquist suggested some limitation on the rights of some foreign nationals in the United States in his plurality opinion in *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990), in which he suggested that a Mexican citizen who had been involuntarily brought into this country for criminal prosecution was not part of "the people" eligible to invoke the Fourth Amendment. However, he was unable to garner a majority for that view, and Justice Kennedy, whose vote was necessary to the majority in that case, expressly rejected Rehnquist's suggestion that the Fourth Amendment did not extend to all persons present in the United States. *Id.* at 276-77 (Kennedy, J., concurring). Justice Kennedy rested instead on the fact that the search took place beyond our borders, a factor also relied upon by Chief Justice Rehnquist. *Id.* at 278.

17. JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (Taylor & Maury, 1836).

18. The debate that accompanied the enactment and ultimate demise of the Alien and Sedition Acts suggests that there was in fact substantial disagreement about the status of foreign nationals' rights in the early years of the republic, at least in a time of crisis. Opponents of the Alien Act, mostly Republicans, pointed to the broad language of the Bill of Rights and the legal obligations imposed on all persons residing within our territory as support for the notion that foreign nationals were entitled to the protection of the Bill of Rights. Others, mostly Federalists, maintained that the Constitution was a more limited social compact that protected only "we the people." *See* GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS. BORDERS, AND FUNDAMENTAL LAW 52-63 (1996). But as with the

sumptively extends not just to citizens, but to all who are subject to American legal obligations, and certainly to all persons within the United States. Madison's view is buttressed by the fact that when adopted, the rights enumerated in the Bill of Rights were viewed not as a set of optional contractual provisions enforceable because they were agreed upon by a group of states and extending only to the contracting parties, but as inalienable natural rights that found their provenance in God.[19]

While natural law theories hold less influence today, the human rights movement of the last fifty years reflects a remarkably parallel secular understanding, namely that there are certain basic human rights to which all persons are entitled, simply by virtue of their humanity. Human rights treaties, including those that the United States has signed and ratified, uniformly provide that the rights of due process, political freedoms, and equal protection are owed to all persons, regardless of nationality. The Universal Declaration of Human Rights, for example, aptly described by Professor Richard Lillich as the "Magna Carta of contemporary international human rights law," is expressly premised on "the inherent dignity and . . . the equal and inalienable rights of all members of the human family."[20] Every international law scholar to consider the question has concluded that the Universal Declaration extends its rights to non-nationals and nationals alike.[21] The Universal Declaration explicitly guarantees the rights of due process, political expression and association, and equal protection.[22]

Sedition Act, so with the Alien Act, those espousing the more inclusive, rights-protective views ultimately prevailed, and the Alien Act sunsetted two years after its enactment. *Cf.* New York Times Co. v. Sullivan, 376 U.S. 254, 273-76 (1964) (relying on history of repudiation of Sedition Act as evidence for importance of protecting political dissent under First Amendment).

19. *See generally* Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987).

20. RICHARD B. LILLICH, THE HUMAN RIGHTS OF ALIENS IN CONTEMPORARY INTERNATIONAL LAW 41 (Manchester University Press 1984); Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. GAOR, 3d. Sess., Supp. No. 13, at 71, U.N. Doc. A/810 (1948).

21. LILLICH, *supra* note 20, at 43; Baroness Elles, *International Provisions Protecting the Human Rights of Non-Citizens* at 45, U.N. Doc. E/CN.4/Sub.2/392/Rev.1, U.N. Sales No. E.80.XIV.2 (1980); David Weissbrodt, *Prevention of Discrimination and Protection of Indigenous Peoples and Minorities: The Rights of Non-Citizens* at 30, U.N. Doc. E/CN.4/Sub.2/2001/20 (2001); CARMEN TIBURCIO, THE HUMAN RIGHTS OF ALIENS UNDER INTERNATIONAL AND COMPARATIVE LAW (2001).

22. Universal Declaration of Human Rights, pmbl., art. 7-11, 19, 20(1), G.A. Res. 217A(III), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948).

The International Covenant on Civil and Political Rights similarly extends its protections generally to noncitizens; the Human Rights Committee's authoritative commentary provides that "in general, the rights set forth in the Covenant apply to everyone . . . and irrespective of his or her nationality or statelessness."[23] These principles are also reflected in the Declaration on the Human Rights of Individuals Who are Not Nationals of the Country in which They Live, adopted by the U.N. General Assembly in 1985. It expressly guarantees to non-nationals, among other rights, the right to life, the right not to be subjected to arbitrary arrest or torture, due process, equality before the courts, and the freedoms of thought, opinion, conscience, religion, and expression.[24] The only civil and political rights that international law does not generally guarantee on equal terms to citizens and non-nationals are the right to vote, the right to run for elective office, and the rights of entry and abode.[25]

While domestic practices diverge in some respects, other nations also generally recognize that foreign nationals are entitled to the same basic human rights as their own citizens. Some constitutions, such as Sweden's, expressly guarantee equal rights and freedoms to non-nationals.[26] Other constitutions, such as Canada's, guarantee basic human rights to "everyone," much as ours does to "persons," and have therefore been read to protect

23. General Comment 15, The Position of Aliens Under the Covenant, Human Rights Committee, U.N. Doc. HRI/GEN/l/Rev.1, at 18 (1994), 27th Sess. 1986, at para. 7; LILLICH, *supra* note 20, at 46; Weissbrodt, *supra* note 21, at 38-43.

24. U.N. GAOR, 40th Sess., Supp. No. 53, at 252, U.N. Doc. A/40/53 (December 13, 1985). Interestingly, while international instruments generally prohibit discrimination on a number of grounds, including national origin, they generally do not expressly prohibit discrimination on grounds of nationality. "'[N]ational origin' refers to a person's descent, not to his juridical nationality." LILLICH, *supra* note 20, at 46. However, international scholars have nonetheless generally interpreted human rights treaties to bar nationality-based discrimination, except pursuant to otherwise lawful immigration restrictions, or in times of war, where necessary to defend the nation. *See* Weissbrodt, *supra* note 21, at 30, 37; Elles, *supra* note 21, at 299.

25. B. G. Ramcharan, *Equality and Nondiscrimination*, *in* THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 246, 263 (Louis Henkin ed., 1981).

26. Peter Nobel, *The Alien Under Swedish Law*, 11 COMP. L. Y.B. 165, 168 (1992) (noting that "as far as constitutional rights and freedoms are concerned, the alien lawfully staying in Sweden is equal to the national in respect of the freedoms of expression, information, congregation, political and religious opinions, association, demonstration and all rules to protect integrity and rule of law as well as protection of property, material as well as immaterial").

non-nationals living in the country.[27] Italy's Constitution extends fundamental rights, including due process and the freedoms of speech and association, to all persons in Italy, even those who have entered illegally.[28] Germany's Basic Law establishes "human rights" and "everyone's rights" that apply equally to all persons without regard to citizenship. The Basic Law does guarantee certain other freedoms, including the freedoms of assembly and of association, to Germans only, but these rights have been extended by statute to foreigners in the same manner as they apply to citizens.[29] While Great Britain does not have a Constitution, it has recently incorporated the European Convention on Human Rights (ECHR) into its domestic law by statute, and the ECHR generally extends fundamental rights protection to all persons without regard to nationality.[30]

The normative idea underlying this broad consensus is that fundamental rights are owed to persons as a matter of human dignity and should be honored no matter what form of government a particular community chooses to adopt. As David Feldman has written, "there are certain kinds of treatment which are simply incompatible with the idea that one is dealing with a human being who, as such, is entitled to respect for his or her humanity and dignity."[31] The rights of political freedom, due process, and equal protection are among the minimal rights that the world has come to demand of any society. In the words of the Supreme Court, these rights are "implicit in the concept of ordered liberty."[32]

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27. *See, e.g.,* Yamani v. Canada, [1995] 1 F.C. 174 (Can.).

28. LA COSTITUZION [Constitution] arts. 13, 14, 17-21, 24 (Italy); *see* BRUNO NASCIMBENE, LO STRANIERO NEL DIRITTO ITALIANO (1988); Cass., sez. Un., 21 Feb. 2002, n.2513 (*translated as* "citizens of a country other than the EU ones do not only enjoy the fundamental human rights as provided for by national law, international conventions and common principles of international law, but also the principle of equal treatment as Italian citizens with respect to judicial guarantees and due process of law"), *available at* http://www.cittadinolex.kataweb.it/Article/0,1519,18105—1137,00.html (April 24, 2002).

29. RUTH RUBIO-MARIN, IMMIGRATION AS A DEMOCRATIC CHALLENGE; CITIZENSHIP AND INCLUSION IN GERMANY AND THE UNITED STATES 187-88 and n.16 (2000).

30. *See* LILLICH, *supra* note 20, at 94; Weissbrodt, *supra* note 21, at 24 (quoting INT'L CTR. FOR SOCIOLOGICAL, CRIMINAL AND PENITENTIAL RESEARCH AND STUDIES (INTERCENTER), EXCLUSION, EQUALITY BEFORE THE LAW AND NON-DISCRIMINATION 135 (1995)).

31. David Feldman, Human Dignity as a Legal Value - Part I, 1999 Pub. L. 682, 690-91.

32. Palko v. Connecticut, 302 U.S. 319, 325 (1937).

Our own historical experience with restricting fundamental rights on the basis of citizenship should also give us pause about departing from uniformity.[33] Chief Justice Taney's decision in *Dred Scott v. Sandford*[34] sought to define away the rights of even free African Americans by concluding that "persons who are the descendants of Africans who were imported into this country, and sold as slaves," were not *citizens* and therefore could not invoke federal court jurisdiction.[35] Chief Justice Taney reasoned that when the Constitution was adopted, blacks were not protected by its provisions, because they were "considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them."[36]

With the express intent of overruling that reasoning, Congress provided in the Civil Rights Act of 1866 that "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States . . . ."[37] The same Congress enacted the Fourteenth Amendment, which similarly provided that all persons born or naturalized in the United States are citizens, and further guaranteed to all persons in the United States - whether citizens or not - due process of law and equal protection. As Yale Law Professor Alexander Bickel wrote, *Dred Scott* teaches that "[a] relationship between government and the governed that turns on citizenship can always be dissolved or denied [because] [c]itizenship is a legal construct, an abstraction, a theory."[38] It is far more difficult to deny that a human being is a "person."

The fact that noncitizens residing among us, even lawful permanent residents, lack the right to vote provides another reason for extending to foreign nationals the rights reflected in the Bill

33. ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 33-54 (1975).

34. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).

35. *Id.* at 403.

36. *Id.* at 404-405. This is almost the same language the Supreme Court used nearly one hundred years later when it held that Ellen Knauff, a German citizen seeking admission to the country, could assert no constitutional objection to the fact that she was being excluded on the basis of secret evidence because "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950).

37. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27.

38. BICKEL, *supra* note 33, at 53.

of Rights. Foreign nationals residing here must obey our laws and pay taxes; they are even subject to the draft.[39] Yet because they lack the franchise, they are without a meaningful voice in the political bargains that govern their everyday lives. Members of Congress have little reason to concern themselves with the rights and interests of people who cannot vote. As Professor John Hart Ely has argued, non-nationals' interests will almost by definition be undercounted in the political process; as such, they are a "relatively easy case" of a "discrete and insular minority" deserving of heightened protection.[40] Foreign nationals do enjoy some indirect representation, as co-ethnic groups and business interests may sometimes assert their rights, and foreign governments may use diplomatic pressure to protect their nationals in the United States. But such indirect representation is no substitute for the vote. When one adds to this the ignoble history of anti-immigrant sentiment among the voting citizenry, often laced with racial animus, foreigners are a group particularly warranting judicial protection.[41] The Supreme Court itself has acknowledged this, writing that "[a]liens as a class are a prime example of a 'discrete and insular' minority for whom . . . heightened judicial solicitude is appropriate."[42]

II. FREE SPEECH, DUE PROCESS, AND EQUAL PROTECTION

The specific features of the constitutional guarantees of political freedom, due process, and equal protection further support their extension to foreign nationals living in the United States. The First Amendment, for example, protects even the speech of inanimate corporations on the instrumentalist ground that corporate speech contributes to the marketplace of ideas.[43] If protecting corporate speech is essential to preserving a robust public

39. David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of Zadvydas v. Davis*, 2001 SUP. CT. REV. 47, 93-94.

40. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 161-62 (1980). Ely notes that "[a]liens cannot vote in any state, which means that any representation they receive will be exclusively 'virtual,'" that they have been the subject of substantial prejudice throughout our history, that recent immigrants in particular tend to live fairly discrete and unassimilated lives, and that "our legislatures are composed almost entirely of citizens who have always been such."

41. While citizenship is a prerequisite to running for president or Congress, the political branches, it is not a requirement for appointment to the federal judiciary.

42. Graham v. Richardson, 403 U.S. 365, 372 (1971) (citations omitted).

43. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

debate, so too is protecting noncitizens' speech. In classrooms, courts, workplaces, private associations, and town hall meetings, noncitizens and citizens routinely find themselves side-by-side. If noncitizens did not have the same First Amendment rights to express themselves as citizens, the conversations in each of these settings would be considerably less free. If my foreign law students were not as free as their U.S. citizen classmates to speak their minds, the classroom dialogue would be impoverished. And if Peter Jennings, until recently a Canadian citizen, were unable to speak as freely as Dan Rather, a United States citizen, we would all suffer.

Nor does it make sense to maintain, as the United States government has, that foreign nationals enjoy full First Amendment freedoms *except* when facing the immigration power. It makes no sense to say that a foreign national has a First Amendment right to criticize government officials or to join political groups without fear of criminal prosecution, but that he may be deported for the same activities. Just as one cannot be a little bit pregnant, a foreign national cannot be a little bit restricted in his or her right to speak. If a foreign national has no First Amendment rights in the deportation setting, he has no First Amendment rights anywhere; the fear of deportation will always and everywhere restrict what he says.[44]

Those who view the First Amendment as serving the ends of self-government might argue that because noncitizens do not have a right to participate directly in self-government, their expressive rights are less important to protect than those of citizens. But the First Amendment protects speech for a range of reasons not limited to informing the right to vote. Free speech furthers autonomy, critical thinking, self-expression, the search for truth, and the checking of government abuse, all interests that noncitizens share equally with citizens. Corporations, minors, and many ex-convicts cannot vote, yet their speech rights are nonetheless protected. Moreover, the very fact that noncitizens cannot vote but nonetheless are affected by the political decisions of the community in which they reside only underscores the impor-

44. American-Arab Anti-Discrimination Comm. v. Meese, 714 F. Supp. 1060, 1081 (C.D. Cal. 1989) ("it is impossible to adopt for aliens a lower degree of First Amendment protection solely in the deportation setting without seriously affecting their First Amendment rights outside that setting"); American-Arab Anti-Discrimination Comm. v. Thornburgh, 970 F.2d 501 (9th Cir. 1992).

tance of protecting their speech and associational rights. At a minimum, those who can vote need to hear from those who cannot if the democratic process is to have any hope of taking their interests into account.

The Fifth and Fourteenth Amendment Due Process Clauses should also apply equally to citizens and noncitizens. If the state cannot take a citizen's life, liberty, or property without due process of law, why should it be able to take a noncitizen's life, liberty or property without due process? It is generally just as much an imposition on a foreign national's physical freedom to be locked up as it is an imposition on a citizen's freedom. The government sometimes argues that noncitizens are entitled to diminished due process, but it is not clear why that should be so.[45] Determining what process is constitutionally due in any given case requires balancing the individual's interest against the government's interest while considering whether the procedure under challenge is likely to produce erroneous results.[46] Individual interests in life, liberty, and property do not usually vary depending on nationality. There may be particular situations in which a foreign national's interests will be less substantial than a citizen's, but the presumption certainly ought to be that liberty is liberty, life is life, and property is property. Similarly, the significance of the government's interest should not generally turn on the citizen/noncitizen distinction. The interest in national security, for example, would be equally threatened by exposure of confidential information in a criminal case involving a citizen, a criminal case involving a foreign national, or an immigration proceeding. The national security interests implicated by the prosecution of Zacarias Moussaoui, indicted as the so-called "twentieth hijacker," would not be different were he a citizen, nor were he in immigration proceedings. Finally, the risk of error from truncated procedures will be precisely the same whether the individual affected is a citizen or noncitizen. Thus, the fac-

45. *See, e.g.*, Testimony of Larry Parkinson, Deputy General Counsel, FBI, before H.R. Subcomm. on Immgr. of the Jud. Comm., *The Secret Evidence Repeal Act, Hearings on H.R. 2121*, 106th Cong. 18, 36 (Feb. 10, 2000) (arguing that foreign nationals are entitled to diminished due process protection).

46. Mathews v. Eldridge, 424 U.S. 319 (1976) (establishing balancing test for determining what process is due); Landon v. Plasencia, 459 U.S. 21 (1982) (holding that *Mathews* balancing also governs what process is due in immigration proceedings).

tors that guide due process analysis generally should not vary depending on the nationality of the individual.

The government often argues that noncitizens detained while in immigration proceedings have a reduced liberty interest because they have the right to leave the country, and therefore hold the "keys to the cell" in their pockets.[47] In limited settings, this argument may have some traction, as when a foreign national is detained while seeking to enter the country from abroad and is perfectly free to turn around and go home. But foreign nationals who have lived here for any significant stretch of time will likely have developed educational, occupational, personal and community ties that make it less than a simple matter to leave. Immigration law affords every foreign national apprehended in the country the right to contest his removal, and to apply for various forms of relief from removal, but also provides that if a person chooses to leave the country while in removal proceedings he automatically abandons his claim to remain. Similarly, individuals who have applied for political asylum, even at the borders, cannot be said to have the "keys to the cell" in their pockets, as their very contention is that returning home will likely result in their persecution. Finally, the government maintains the authority to deny departure to and maintain in custody even those foreign nationals who agree to leave, indicating that in fact the government ultimately holds the keys.[48] Thus, the ability to leave the country does not generally warrant denying due process to noncitizens. Citizens and foreign nationals ought to enjoy the same due process protections.

Equal protection is more complicated. There is no dispute that noncitizens are entitled to equal protection of the laws; the Court held as much in 1886.[49] Indeed, the Court has held that even undocumented persons illegally here are encompassed by the Equal Protection Clause, ruling that Texas could not deny

47. *See, e.g.*, Kiareldeen v. Reno, 71 F. Supp.2d 402, 410 (D.N.J. 1999) (rejecting government's "keys to cell" argument).

48. *See* U.S. Department of Justice, Office of Legal Counsel, Limitations on the Detention Authority of the Immigration and Naturalization Service (Feb. 20, 2003); U.S. Department of Justice, Office of Inspector General, The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks (Apr. 2003, released June 2003).

49. *Yick Wo*, 118 U.S. at 369.

public education to the children of "illegal aliens."[50] But what equal protection actually means with respect to distinctions based on nationality, alienage or national origin is less clear. Equal protection, after all, does not require identical treatment of all persons in all matters, but only forbids different treatment of similarly situated persons without an adequate justification. Citizens and noncitizens are not similarly situated in all respects, and in some instances their differences will justify differential treatment. Most significantly, a citizen cannot be expelled from the country no matter how egregious his conduct, while a noncitizen may be expelled even for trivial infractions. In most respects, however, citizens and noncitizens are similarly situated.

The general rule, is that where foreign nationals and citizens are similarly situated, they must be treated equally. Indeed, the Court treats alienage as a "suspect" classification, and state laws discriminating on the basis of alienage, nationality, or national origin are generally as presumptively invalid as laws discriminating along racial lines.[51] There are very good reasons for this, given noncitizens' lack of political voice, and the history of alienage and nationality discrimination as a cover for racial animus and political repression. This rule, however, is subject to two significant exceptions. First, because the federal immigration power by definition treats foreign nationals differently from citizens, federal discrimination on the basis of alienage in regulating immigration is generally permissible. As noted above, the Supreme Court has acknowledged that "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."[52] But this statement should not be read too broadly. In context, it referred only to Congress's power to exclude and remove foreign

50. Plyler v. Doe, 457 U.S. 202 (1982).

51. *Graham*, 403 U.S. 365 (striking down under "strict scrutiny" a state statute denying welfare benefits to certain persons based on their immigration status). A distinction based on alienage differentiates between citizens and noncitizens generally; all of immigration law has at least this feature. A classification based on nationality treats nationals of particular countries differently, as in laws currently on the books treating Cuban nationals more favorably than other immigrants. And discrimination on the basis of national origin is predicated on the individual's country of birth, regardless of current citizenship (as in the Japanese internment laws, which subjected both U.S. citizens and foreign nationals of Japanese descent to internment during World War II). All three types of distinction are presumptively invalid when adopted by states.

52. *Mathews*, 426 U.S. at 90.

nationals, a power that by definition differentiates between citizens and foreign nationals.[53]

Second, the Court permits states to bar foreign nationals from public employment connected to the administration of public policy, including such positions as police officers, schoolteachers, and even deputy probation officers.[54] It reasons that a state may limit those who formulate and carry out public policy to those who are citizens of the polity. In adopting these two exceptions, the Court has not declared that equal protection is inapplicable, but only that noncitizens are differently situated from citizens in these areas with respect to the immigration power, because noncitizens are uniquely subject to that power; and with respect to self-government, because they are not necessarily part of the polity.[55]

In short, contrary to widely held assumptions, the Constitution extends fundamental protections of due process, political freedoms, and equal protection to all persons subject to our laws, without regard to citizenship. These rights inhere in the dignity of the human being, and are especially necessary for people, like non-nationals, who have no voice in the political process. The rights to political participation, entry, and abode, by contrast, are rights that may be limited to the citizenry; they are inextricable from a polity's ability to define itself, and they are virtually universally recognized as legitimately limited to the citizenry. By contrast, there are no good reasons specific to the rights of speech, association, or due process that warrant diminished protection for non-nationals. While relevant differences between noncitizens and citizens do justify some differences in treatment, beyond those limited differences, noncitizens are presumptively entitled to equal protection of the laws.

The notion that noncitizens are entitled to the same constitutional protection for their basic human rights as citizens must be qualified in at least one respect. The Supreme Court has his-

53. T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP 156 (2002).

54. *Foley*, 435 U.S. 291 (permitting states to require citizenship in hiring state troopers); *Ambach*, 441 U.S. 68 (permitting states to require citizenship in hiring public school teachers); *Cabell*, 454 U.S. 432 (permitting states to require citizenship in hiring of deputy probation officers).

55. *See Cabell*, 454 U.S. at 438 (citizenship is "not a relevant ground for [state] distribution of economic benefits . . . [but] it is for determining membership in the political community").

torically treated foreign nationals outside our border very differently from those within our jurisdiction. As the Court recently noted, "it is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders. But once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States . . ."[56] Like plenary power, however, the notion that foreign nationals outside our borders enjoy no constitutional protection has often been overstated. The case most often cited for the proposition, *United States ex. rel Knauff v. Shaughnessy*,[57] involved a challenge to the procedures used to decide an initial entrant's request for admission. The Court reasoned that noncitizens seeking initial entry have no right to enter, and therefore may not object on due process grounds to the procedures used to determine whether they may enter.

That result, however, does not compel the much more sweeping conclusion that foreign nationals outside our borders have no constitutional rights whatsoever. Rather, it may simply reflect the proposition - equally applicable to citizens - that where a statute does not create an entitlement, no "liberty" or "property" interest is implicated by the denial of the gratuitous benefit it offers, and therefore due process does not attach.[58] Since the Court treated Knauff as having no entitlement to enter, but as merely seeking a benefit, she had neither a liberty nor a property interest sufficient to trigger due process protection, just as a convicted prisoner has no liberty or property interest in a discretionary pardon from the governor, and therefore may not challenge the procedures by which pardons are granted. Where, by contrast, the government is not merely denying foreign nationals outside of our borders a gratuitous benefit, but affirmatively subjecting them to the obligations of our legal system, they should reciprocally receive the protection of the constitutional

56. *Zadvydas*, 533 U.S. at 693 (citations omitted).

57. 338 U.S. 537.

58. *See, e.g.*, Olim v. Wakinekona, 461 U.S. 238, 248-49 (1983) (holding that state prison regulations did not create a liberty interest implicated by a transfer to another state, and therefore due process was not triggered); Board of Regents of State Colleges v. Roth, 408 U.S. 564, 578 (1972) (holding that an untenured professor had no property interest in being rehired and therefore no due process objection to the procedures used to reach that decision).

limits on such government action.[59] On this view, while a decision to deny initial entry to a foreign national might not trigger due process, because he has no independent right to enter, a decision to *detain* an entering non-national would trigger due process, because detention affirmatively deprives the person of physical liberty, and "[f]reedom from imprisonment . . . lies at the heart of the liberty that [the Due Process] Clause protects."[60] Admittedly, *Knauff* and *Shaughnessy v. United States ex rel. Mezei*,[61] suggest that detention of arriving foreign visitors does not change the constitutional calculus, but in that respect they are wrongly decided, because detention cannot be equated with the mere denial of a benefit.[62]

To assert that noncitizens are entitled to substantially the same constitutional rights protections as citizens is not to assert that these rights are absolutes, or that the Constitution is a suicide pact. With the exception of the bans on slavery and torture, most constitutional rights are not absolutes, but presumptive protections that may be overridden by compelling showings of governmental need and narrow tailoring. Thus, for example, the First Amendment creates a strong presumption of protection for speech, but that presumption is overridden where the speech is intended and likely to incite imminent lawless action.[63] My claim is not that such categorical balancing is inappropriate, but that we should not cheat on the balance by drawing the line differently for non-nationals and citizens. While the definition of most constitutional rights contains an implicit consequentialist balance, the balance should be struck equally for all - even if it might appear convenient or politically tempting to strike it differently for some.

59. *See* NEUMAN, *supra* note 18, at 108-17 (arguing that aliens should have constitutional rights abroad where the United States imposes its sovereign legal obligations on them).

60. *Zadvydas*, 533 U.S. at 690; *see also* Foucha v. Louisiana, 504 U.S. 71, 80 (1992) ("[C]ommitment for any purpose constitutes a significant deprivation of liberty that requires due process protection"); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) ("Without doubt, [liberty] denotes . . . freedom from bodily restraint.").

61. 345 U.S. 206.

62. *See* David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 EMORY L.J. 1003, 1031-37 (2002).

63. Brandenburg v. Ohio, 395 U.S. 444 (1969).

III. LOYALTY, PLENARY POWER, THE RIGHT/ PRIVILEGE DISTINCTION, AND THE VALUE OF CITIZENSHIP

Defenders of exceptional government power over noncitizens nonetheless offer several arguments for not extending the same rights to foreigners that we extend to citizens. Foreign nationals have taken no oath of loyalty to this country and presumably maintain their principal fidelity elsewhere. While citizens have a right to permanent residence in the United States, foreign nationals have no constitutional right to reside here. The political branches' broad authority over immigration justifies diminished rights in the immigration setting. Foreign nationals come and live among us as our guests, on whatever conditions we set. And if we were to extend to foreign nationals the same rights that citizens enjoy, we would devalue citizenship itself. For these reasons, it is said, treating foreign nationals differently does not violate basic norms of equality and dignity, but simply reflects that they are in fact different.[64]

None of these arguments warrants affording diminished constitutional protection to non-nationals residing among us. Loyalty is a red herring. Most citizens became citizens by the accident of birth, not by passing any test of commitment. Nonnationals choose to come here, while most citizens were simply born here and did not leave.[65] Presumptive loyalties to other nations are especially irrelevant in the war on terrorism, where our adversary is not a nation, but a criminal organization, and is indeed a common adversary of many of the Arab and Muslim nations whose citizens the government has targeted. Saudi Arabia, Pakistan, and Egypt, for example, are among our most important allies in the war on terrorism, yet their citizens have been discriminatorily subjected to registration, interviews, detentions, and deportations.

Perhaps the most common argument for reduced constitutional protection for noncitizens invokes what the Supreme Court has called the political branches' "plenary power" over im-

64. The issue here is not whether it makes sense to focus on Arab and Muslim foreign nationals in the search for Al Qaeda operatives. The question posed here is broader: Are noncitizens living in the United States, or otherwise subjected to American legal obligations, entitled to the same basic constitutional protections as citizens, or do they deserve only diminished constitutional safeguards?

65. RUBIO-MARIN, *supra* note 29, at 52.

migration.[66] The doctrine, founded on notions of the sovereign's inherent power to control its borders, counsels considerable judicial deference in reviewing the substantive terms Congress sets for admission. But the plenary power doctrine is frequently overstated and has been narrowed by Supreme Court decisions. In 2001, for example, the Court summarily rejected the government's assertion of plenary power in a case involving indefinite detention of criminal non-nationals, insisting that the plenary power "is subject to important constitutional limitations."[67]

In particular, the plenary immigration power does not justify differential treatment of foreign nationals' First Amendment speech and associational rights or Fifth Amendment due process rights. Indeed, the Supreme Court has insisted that the First and Fifth Amendments acknowledge no distinctions between citizens and noncitizens residing here.[68] When the United States government argued in the Cold War that Congress had plenary power to deport foreign nationals for their speech and associations, the Court declined to adopt that contention, but instead upheld the challenged immigration law under the then-prevailing First Amendment standard for citizens.[69] Similarly, with one exception, the Court has generally applied the same due process analysis to preventive detention of foreigners in immigration proceedings and of citizens in criminal and civil commitment settings, treating the cases interchangeably.[70]

66. *See, e.g.*, Fiallo v. Bell, 430 U.S. 787, 796 (1977) (quoting *Mathews*, 426 U.S. at 81-82); *The Chinese Exclusion Case*, 130 U.S. at 603-06. The plenary power doctrine has been subject to widespread criticism. *See* STEPHEN H. LEGOMSKY, IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA 177-222 (1987); NEUMAN, *supra* note 18, at 118-38; Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853 (1987).

67. *Zadvydas*, 533 U.S. at 695; *see also* Carlson v. Landon, 342 U.S. 524, 537 (1952) (noting that "the power to expel aliens . . . is, of course, subject to judicial intervention under the 'paramount law of the Constitution.'" (citations omitted)).

68. *Chew*, *supra* note 5, at 596 n.5 (1953).

69. Harisiades v. Shaughnessy, 342 U.S. 580 (1952); Dennis v. United States, 341 U.S. 494 (1951); see *American-Arab Anti-Discrimination Comm. v. Meese*, 714 F. Supp. at 1077-78; *see also* T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT'L L. 862, 869 (1989).

70. *See, e.g.*, *Zadvydas*, 533 U.S. at 690 (relying on *United States v. Salerno*, 481 U.S. 739 (1987), involving the preventive detention of a citizen in criminal proceedings, and *Foucha*, 504 U.S. 71, involving preventive detention of citizen in civil commitment proceeding). *See generally* Cole, *supra* note 62; *see also Salerno*, 481 U.S. at 748 (citing *Carlson*, 342 U.S. 524, as support for permitting preventive detention in some circumstances in criminal cases).

The one exception is the Court's 2003 decision in *Demore v. Kim*, which upheld a statute mandating preventive detention during deportation proceedings of foreign nationals charged with certain criminal offenses.[71] Under the statute, even persons who pose no risk of flight and no danger to the community must be detained. In a five-to-four decision, the Court pointed to statistics showing that significant percentages of "criminal aliens" committed more crime upon release and/or failed to appear for their deportation hearings, and reasoned that Congress could therefore make a categorical judgment that no such persons should be released on bond while in deportation proceedings. The decision marks the first time outside of a war setting that the Court has upheld preventive detention of *anyone* without an individualized assessment of the necessity of such detention. And the majority expressly rested its decision on a double standard, noting that Congress can make rules in the immigration setting that would be unacceptable for citizens. But the Court failed to explain the double standard's extension to preventive detention. As noted above, the liberty interests of the detainee and the government's interests in preventing flight or danger to the community are no different for noncitizens in immigration proceedings than for citizens in criminal proceedings. *Demore* thus asserts, but does not justify, differential treatment of foreign nationals' due process rights.

A third argument commonly heard as a rationale for affording noncitizens less robust rights protection maintains that because noncitizens are only "guests"[72] who have "come at the Nation's invitation,"[73] their admission and continuing presence may be conditioned on whatever constraints the government chooses to impose. As the Supreme Court once put it, deportation "is simply a refusal by the Government to harbor persons whom it does not want."[74] If you don't like it, the argument goes, either don't come, or get out. This argument seeks to transform what we generally think of as inalienable rights into discretionary privileges that can be granted or denied at will. It uses the fact that a foreign national's entry is a privilege to recast re-

71. *Demore*, 538 U.S. 510.

72. *Mathews*, 426 U.S. at 80.

73. *Carlson*, 342 U.S. at 534; *Foley*, 435 U.S. at 294.

74. Bugajewitz v. Adams, 228 U.S. 585, 592 (1913).

strictions on his or her rights here as conditions on the privilege of entry.

This argument proves too much. It would negate virtually all constitutional rights of noncitizens, and relegate an entire class of the populace to a wholly unprotected status. A law mandating detention of all noncitizens who marry noncitizens of other races, for example, would be immune from due process, privacy, and equal protection challenges because it could be defended as a mere condition on noncitizens' entry. The Supreme Court has rejected such reasoning, in the immigration area and elsewhere, precisely because it would allow the government to achieve indirectly, by attaching conditions to benefits, what it cannot achieve directly. As the Court stated in 1971 in a case involving noncitizen rights, "this Court has now rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'"[75] Under contemporary constitutional law, equal protection prohibits invidious discrimination in the allocation of benefits as well as of rights, and the Court's "unconstitutional conditions" doctrine provides that the government acts unconstitutionally when even wholly discretionary benefits are denied because of the recipient's exercise of constitutional rights.[76] Thus, the right-privilege distinction does not justify a denial of immigrants' rights.

Finally, some warn that extending substantially equal rights to foreign nationals will dilute the value of United States citizenship, and thereby create fewer incentives for immigrants to become naturalized citizens.[77] Citizenship would undoubtedly be more attractive if basic protections against government intrusions on privacy, equality, liberty, and life were available exclusively or in more generous measure to citizens. But devaluing human beings' basic rights is an illegitimate means toward that end. As

75. *Graham*, 403 U.S. at 374.

76. *See, e.g.*, Rust v. Sullivan, 500 U.S. 173, 197 (1991) (characterizing "unconstitutional condition" cases as involving "situations in which the Government has placed a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program"); Connick v. Myers, 461 U.S. 138, 142 (1983) ("For at least 15 years, it has been settled that a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression").

77. *See, e.g.*, PETER SCHUCK, CITIZENS, STRANGERS, AND IN-BETWEENS: ESSAYS ON IMMIGRATION AND CITIZENSHIP (NEW PERSPECTIVES ON LAW, CULTURE, AND SOCIETY) (1998).

long as citizens alone are afforded the rights to vote, to take part in the political process of self-government, and to permanent abode, rights traditionally limited to citizens the world over, there seems little danger that citizenship will be devalued in any deeply troubling way.

Thus, there is little reasoned support for the widely held notion that noncitizens are entitled to substantially less constitutional protection than citizens. While not identically situated in all respects, foreign nationals should enjoy the same constitutional protections for fundamental rights and liberties as United States citizens. The areas of permissible differentiation - admission, expulsion, voting, and running for federal elective office - are much narrower than the areas of presumptive equality - due process, freedom of expression, association, and religion, privacy, and the rights of the criminally accused.

When we balance liberty and security, in other words, we should respect the equal dignity and basic human rights of all persons. In the wake of September 11, we have failed to follow that mandate. When we spy on foreign nationals without probable cause but not citizens, selectively target foreign nationals for registration, detention, and deportation based on their ethnic and religious identities, and lock up foreign nationals in secret or without any hearings at all, we have chosen the easy way out: sacrificing their rights for our purported security. In the end, the true test of justice in a democratic society is not how it treats those with political power, but how it treats those who have no voice in the democratic process. How we treat foreign nationals, the paradigmatic other in this time of crisis, ultimately tests our own humanity.